# NATIONAL GUARD INVESTIGATING DISCRIMINATION COMPLAINTS

## NGR (AR) 600-690/NGR (AF) 40-1614

## NGR 600-22/ANGI 36-3

# DIVERSITY = READINESS

# WHAT IS THIS ALL ABOUT?

**It is the *policy* of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.**

# FEDERAL CIVILIAN vs. FEDERAL MILITARY UNDER THE POLICY

- Many statutes have been enacted by the Federal government to assure equal opportunity and treatment (EOT).
- Almost all Federal EOT statutes apply to Federal civilian employees.
  - BUT These statutes do not cover members of the uniformed Armed Forces,
- HOWEVER the Department of Defense strictly applies an anti-discrimination policy to members of the military.
- Primary difference in bifurcated system:
  - Military members are limited to presenting their complaint to forums within the Executive Department of the United States.
  - Civilian employees usually have the right to file a complaint before an independent Federal court after exhausting administrative remedies.

# WHERE IS THE POLICY FOUND?

**Civilian Discrimination Process:**

- **Title VII of the Civil Rights Acts of 1964, as amended, and the Civil Rights Act of 1991 (42 U.S.C. § 1999(e) et seq.) prohibits employment discrimination based on race, color, religion, national origin, reprisal and sex.**
- **The 1972 amendment made Title VII applicable to federal employees.**
- **Section 633(a) of the Age Discrimination In Employment Act (29 U.S.C. § 621 et seq.) prohibits discrimination based on age (i.e., persons at least 40 years of age with no age cap).**
- **The Rehabilitation Act of 1973 (29 U.S.C. § 791 et seq.) prohibits discrimination by the federal government in hiring, promoting and other employment decisions affecting handicapped individuals.**

**Military Discrimination Process:**

**Department of Defense Policy**

# PRACTICE TIP

**The NGB has separate and distinct equal opportunity and treatment programs for civilian employees and military members.**

- **KEY = STATUS**
  - **<u>military complainants</u> are handled under NGR 600-22/ANGI 36-3 NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM**
  - **<u>civilian complainants</u> are handled under NGR(AR) 690-600/NGR(AF) 40-1614 Vol. I NATIONAL GUARD CIVILIAN DISCRIMINATION COMPLAINT SYSTEM and Vol. II CIVILIAN DISCRIMINATION COMPLAINT PROCESSING AND ADJUDICATION.**

# EEOC ENFORCES THE CIVILIAN POLICY

- The Equal Employment Opportunity Commission (EEOC) was given the responsibility to enforce and regulate these areas.
- The EEOC has promulgated regulations for this purpose at 29 C.F.R. § 1614.101 et seq.
- The EEOC has new regulations which were effective on 9 November 1999.
- Applies to federal “agencies,” i.e., DoD

# FROM EEOC TO DOD POLICY

- **DoD Directive 1440.1, "The DoD Civilian Equal Employment Opportunity (EEO) Program":**
  - **Establishes the Civilian Equal Employment Opportunity (EEO) Program, to include affirmative action programs, consistent with guidance from the Equal Employment Opportunity Commission (EEOC), Office of Personnel Management (OPM), and the DoD Human Goals Charter.**
  - **Authorizes the issuance of DoD Instructions and Manuals to implement this Directive and guidance from standard-setting Agencies such as EEOC and OPM.**

- **Become familiar with the provisions of 29 C.F.R. § 1614.101 et seq. as these are the EEOC regulations that govern the process.**
- **Every office should have a copy of 29 C.F.R. part 1614 and the NGR(AR) 690-600/NGR(AF) 40-1614 Vols. I&II, which supplement the EEOC regulations.**
- **Each office should obtain a copy of the EEOC's Management Directive 110.**
  - **Describes how EEO cases should be processed.**
  - **Find answers to many of the questions that you have about EEO procedures.**

# CHAIN OF COMMAND ENFORCES THE MILITARY POLICY

- **Promotes, supports, and enforces the MEO**
- **program**
- **Primary and preferred channel for identifying and correcting discriminatory practices**
- **Responsible for creating and maintaining an MEO environment**

- ***DODD 1350.2 Department of Defense Military Equal Opportunity (MEO) Program, August 18, 1995 thru Ch 1, May 7, 1997, USD(P&R)***

# DOD AND THE INVESTIGATION REQUIREMENT

**Military: The DoD shall:**

- Ensure fair, impartial, and timely *investigation*
- Develop procedures for and implement systems for *investigation*

- *DODD 1440.1 The DoD Civilian Equal Employment Opportunity (EEO) Program, May 21, 1987 thru Ch 3, April 17, 1992, ASD(FM&P)*

**Civilian: The DoD shall:**

- Ensure that all discrimination complaints are investigated in a fair, impartial, and prompt manner

- *DODD 1350.2 Department of Defense Military Equal Opportunity (MEO) Program, August 18, 1995 thru Ch 1, May 7, 1997, USD(P&R)*

# CIVILIAN INVESTIGATION REQUIREMENT

**NGR(AR) 690-600/NGR(AF) 40-1614 Vols. I&II**

- **Implements federal statutes and regulations and DoD Directives**
- **Vol II, Chapter 5 – Fact Finding and Investigation:**
  - **General**
  - **Purpose of fact finding and investigation**
  - **Fact Finding**
  - **Assignment of an investigator**
  - **Authority of the investigator**
  - **Scheduling the on-site investigation**
  - **State National Guard support requirements**
  - **Conduct of the investigation**
  - **Investigative fact finding hearing**
  - **Witness and testimony**
  - **Problems and delays**
  - **Report of the Investigation**
  - **Purpose and use of the ROI**
  - **Notice of the investigation completion**

# BUT WAIT … DON’T FORGET

- **NGR(AR) 690-600/NGR(AF) 40-1614 Vol. II contains 3 types of information gathering procedures:**
- **Inquiry**
  - **EEO Counselor**
- **Fact Finding**
  - **NGB-EO**
- **Investigation**
  - **Investigator**

# INFORMATION GATHERING: ON THE MILITARY SIDE

- **Fact Finding**
  - **Present basic facts to Commander at complaint level**
  - **Facilitate resolution at lowest level**
- **Inquiry**
  - **Determine validity & merit of discrimination allegations**
  - **Review records/directives; examine material evidence; interview persons direct knowledge**
  - **Used by complaint level Commander = appointing authority for investigator**
- **Investigation**
  - **Administrative fact finding procedure for discrimination & sexual harassment allegations**
  - **Determine what actually occurred**
  - **Assess validity of allegations**
  - **Advise command on contributing leadership/management concerns**
  - **Recommend appropriate corrective action**

# CIVILIAN INVESTIGATION

- Who ?
- What ?
- Where ?
- When ?
- How ?

# WHO: THE INVESTIGATOR

- NGB assigns
- Independent
  - Parties
  - AG
  - State NG officials

# WHO: SEEM

- SEEM
  - Notified of Investigator assignment
    - Notifies State JA of assignment
  - Coordinates on site investigation logistics with Investigator
  - With JA prepares NG position for investigative fact finding hearing

# PRACTICE TIP

- **JAGs enforce EO laws with/<u>without</u> complaint**
- **If something wrong - get in advise CC**
- **Unresolved Now = Problems Later**
- **BL: Problems = Morale = Productivity**

# WHAT: THE INVESTIGATION

- **A duly authorized, systematic, detailed examination to uncover facts and determine the truth. It is a formal process which must produce sufficient detail to support a finding of discrimination or no discrimination. Investigation of allegations of discrimination are conducted under the authority of this regulation. They are conducted in accordance with the provisions of the NGB Investigators Procedural Manual, chapter 5 of this regulation, 29 CFR 1614, and the EEOC Management Directives.**

- **Avoid Inadequate Investigations:**
- **Substantive**
  - **Appropriate witnesses not interviewed**
  - **Relevant exhibits not gathered**
- **Procedural**
  - **the haphazard report**
    - **tabbed but no table of contents**
    - **no index keyed to tabs**
    - **should be well organized, identifiable, intelligible, coherent, and complete with all relevant material**
- **Number the pages**
  - **makes investigative file easier to use**
    - **hearing**
    - **writing the decision**
    - **appeal briefs**

# WHERE

- On-site Investigation
  - State NG support requirements
    - Pre-visit info (hotel, transportation, access, etc.)
    - Location for hearing
    - Private office and telephone
    - Certified court reporter/verbatim transcript
    - Ensure people present/available
    - Documents

# WHEN: INVESTIGATION TIMELINE

- Assignment of the Investigator
  - NGB determines formal complaint requires investigation and assigns investigator
  - NGB transmittal: copy case file, authorization letter, pertinent instructions
  - NGB advises SEEM of assignment
    - SEEM prepares for investigation
    - SEEM notifies
- 45 days from Investigator's receipt of transmittal he/she must complete ROI

# HOW: INVESTIGATION CONDUCTED

- **IO General Responsibilities:**
  - **Fair and impartial**
  - **Facts and circumstances**
  - **Ensure sufficient evidence for NGB conclusions and findings**
  - **Use NGB Investigators Procedural Manual**
- **IO Specific Responsibilities (pre-site investigation):**
  - **Thorough review complaint case file**
  - **Supplement file with additional documents**
  - **Schedule on-site investigation**
  - **Conduct investigative fact finding hearing**

# HOW: INVESTIGATION CONDUCTED

- IO On-Site Investigation Responsibilities:
  - Obtains documentary evidence & interview witnesses
    - parties
    - issue(s)
  - Collects facts/Develop information
    - merits of each issue
  - Reviews discrimination circumstances
  - Collects & Analyzes info on treatment Complainants group
  - Investigates work policies & practices
  - Refrains from expanding scope
  - BL: gathers enough evidence for yes/no finding discrimination

# HOW: INVESTIGATION CONDUCTED

- **NG & Complainant Witness Responsibilities**
  - **Provide IO witness wish list**
  - **IO decides**
  - **IO advise who (to include his additional)**
  - **ROI includes reason NG & Complainant witnesses not chosen**

Before arriving on site, the investigator usually sends a letter to the activity identifying what exhibits and witnesses are needed. The JAG should give responsibility for gathering the exhibits to the SEEM. The JAG should interview the management witnesses relevant to the complaint before the investigator arrives.

<u>The witnesses should be briefed on</u>:

- The EEO complaint process, at what stage the process is, and where it may go, e.g., "you've already talked to the EEO counselor, now you have to attend a hearing where you will have to testify."
- The applicable Title VII law.

<u>Also, JAG</u>:

- Find out from the supervisors why they did what they did. Go over points they should remember for the hearing even if the investigator does not ask them about it.
- Make sure the management officials are responding to all the allegations accepted in the formal complaint as well as the

# INVESTIGATIVE FACT FINDING HEARING

- **Purpose: obtain evidence on issues from individual testimony**
  - **Bring out all relevant facts**
  - **Foster resolution**
  - **Provide parties access to all testimony**
- **Nature: administrative not judicial**
  - **rules of evidence not strictly applied**
  - **Closed to public**
    - **IO**
    - **Court reporter**
    - **Witness and attorney**
    - **Complainant and attorney or representative**
    - **NG legal rep – JAG**
    - **Observer – EEO or NGB official**

# HEARING PROCESS

- Testimony of Witnesses
  - Obtained by personal interview on-site
  - Sworn verbatim but not reviewed/signed
  - Witness advisement
  - May make statement
  - Non-adversarial, orderly & dignified
  - Responsible Individual/Official Witness
    - Named by Complainant as responsible for alleged acts of discrimination
    - IO advises person of allegation details and accepted issues which they are named
  - Only IO questions
    - IO asks NG & Complainant if clarification required
    - IO determines if clarification required.
- NG representative & Complainant statement

# Legal Rights of Witnesses

- General. As a matter of courtesy and good investigative practice, the investigator should always introduce himself/herself and explain that they are conducting an official investigation and should explain the nature of the investigation.
- Specific:
  - Right to representation at own expense
  - Testimony under oath & verbatim
  - Testimony part of ROI & complaint file
    - Copies: NGB, State NG & Complainant
  - Hearing purpose: provide sufficient evidence not determine culpability
  - Testimony & exhibits must be relevant
  - RI advised allegation details & accepted issued in which named

# UNION WITNESS

- Question: **Whether bargaining unit members who reasonably fear disciplinary action in connection with the investigation of an EEO complaint (e.g., complainant has alleged co-workers sexually harassed her), may request union representation, i.e., their Weingarten rights?**

- Answer: **NASA v. FLRA, 527 U.S. 229; 119 S. Ct. 1979; 144 L. Ed. 2d 258 (Supreme Court).**
  - **The contested issue was whether a NASA-OIG investigator could be considered a "representative" of NASA when conducting an employee examination covered by § 7114(a)(2)(B).**
  - **By its terms, § 7114(a)(2)(B) is not limited to investigations conducted by certain "entities" within the agency in question. It simply refers to representatives of "the agency," which, all agree, means NASA**
  - ***BL*: § 7114(a)(2)(B) is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union**

# MILITARY INVESTIGATION OVERVIEW

| INTRODUCTION | PREPARATION | CONDUCTING | REVIEW & ANALYSIS | WRITING THE REPORT |
|---|---|---|---|---|
| References | Getting Started | The IO Roles & Responsibilities | Introduction | Introduction |
| Appointment | POCs | Criminal Conduct | Standard of Proof | Form |
| Complaints | The Case File | Evidence & Testimony | Analytical Framework | Substance |
| | Clarifying the Issues | Investigation Techniques | | |

# INTRODUCTION

- **References**
  - **NG Pam 600-22/ANGP 36-3**
  - **NGR 600-22/ANGI 36-3**
  - **NGB Investigator Procedural Manual**

- **Appointment of the Equal Opportunity Investigator**
  - **AG, Appointing Authority, NGB**
  - **Problem Solver & Fact Finder**
- **Discrimination Complaints**
  - **Race, color, religion, national origin, or sex (includes sexual harassment)**

# Duties of the Investigator-General:

- Collect facts & develop information for objective determination of factual merits of complaint allegation(s)
- Ascertain & consider evidence
  - All sides
  - Each issue
- Make findings & recommendations warranted by facts

## Duties of the Investigator - Specific:

- Witnesses interview
- Document Collection
- Testimony
- Data Collection
- Work Policies & Practices
- ROI

# Preparing for the Investigation (the Pre-Plan Plan)

- Getting Started
- Points of Contact
- The Case File
- Clarifying the Issues
- Plan the Investigation
- Logistics

# The Investigative Plan

- General:
  - Simple statement of intent which lists proposed course of action
  - Provide copy to SEEM before on-site
  - Helps investigation progress
  - Suspense dates
- Elements:
  - Identity of complainant
  - Bases and Issues
  - Identity of named officials
  - Additional info needed
  - Logistical support required
  - Scheduling of witnesses

# Characteristics of a good investigator/investigation, Part 1

- Draft questions in advance
- Interview complainant first
  - Clarify issues
  - If significantly new issues raised, check with appointing authority about expanding scope of investigation
- Don’t always ask questions that require only a “yes” or “no” answer

# Characteristics of a good investigator/investigation, Part 2

- Remain focused on the issues
- Investigation is an administrative procedure, not a criminal procedure
- Assess credibility, motivation, bias and interests - Examine relationships of witnesses with complainant and responsible official
- Corroborate - Don’t accept everything at face value.  Look for supporting info

# Characteristics of a good investigator/investigation, Part 3

- Create a chronology
- Ask for technical/expert assistance on matters relating to complaint issues
- If become aware of additional allegations, immediately notify appointing authority for guidance
- Maintain neutrality

# Naming of Witnesses

- Obtain a list from complainant and alleged responsible official
- List should include name of potential witness and his/her expected testimony
- IO makes final decision on witnesses
- Document reasons for not interviewing those named by the parties

# Potential Witnesses

- Complainant
- Alleged discriminating official
- Expert or professional witness - has special knowledge about a topic and can testify how a process should work
- Character witness - Verify reputation of others (such as personality traits)

# Preparing for the Interview

- Private room
- Court reporter, blank affidavits, tapes and/or tape recorder
- Copies of Privacy Act
- A list of questions

# Admin Steps for Interviews

- Read intro statement in Appendix C of NG Pam 600-22/ANGP 36-3 and swear-in witness
- Ask direct questions
- Ask two final questions
  - Is there anything else you would like to say that has bearing on this matter?
  - Are there any other people to interview?

# Taking Testimony

- Must be sworn/affirmed
- No requirement for signature if witness testimony is transcribed
- Neither Complainant nor Responsible Official are entitled to have representative present when interviewed
- If answer is unclear, ask again
- Only IO and person being interviewed are present during interview

# Interviewing - What to avoid

- Rush
- Ask leading questions
- Be patronizing
- Ask irrelevant personal questions
- Make inappropriate promises
- Give opinion on merit of case

# Options when witnesses absent

- Visit person at new location
- Wait for individual's return, as long as absence is short and temporary
- Telephonic interview
- Mail written interrogatories and receive answers in the form of a sworn, written response

# Immunity and Confidentiality

- Never grant a witness immunity from prosecution
- Nothing is ever done “off-the-record”
- Although complainant will eventually receive a copy of a redacted ROI, the IO does not give it to him/her
- Never inform one witness of the testimony of another

# Criminal Conduct

- EO investigations do not normally address criminal charges
- If you uncover evidence of possible criminal conduct, immediately contact your appointing authority or servicing SJA for guidance
- If discovery occurs during an interview, stop the interview immediately

# Reliable Evidence

- Need dependable/trustworthy evidence.
- Factors:
  - Does witness have an interest in outcome?
  - Is witness biased?
  - A statement of fact or a mere conclusion?
- Evidence of questionable reliability should not be ignored. It may lead to reliable evidence.

# Preponderance of Evidence

- Burden of proof in military complaint
- Evidence on one side outweighs the evidence on other side (even if it is only 51 percent to 49 percent)

# Types of Evidence

- Documentary - Reports, regulations, official and personal correspondence
- Computer records - From e-mail, disks
- Testimony - Presented by live witness in form of sworn testimony
- Circumstantial - Evidence which indirectly proves the existence of a fact
- Hearsay - Testimony not based on personal knowledge. Based on what an individual was told by another/third-person
- Direct - Reveal intentional discrimination caused an adverse action
- Comparative - Compare treatment of complainant w/similarly situated
- Statistical - Examines numerical differences. It cannot prove discrimination standing alone. More powerful when coupled with other evidence

# Report of Investigation (ROI)

- Impartially written
- Accurate and dependable
- Can exist as a “stand-alone” document that includes all pertinent documents, regulations and testimony examined
- Prepared as if reader has no prior knowledge of complaint
- Address each basis and issue
- Cite full name, rank and duty of any person mentioned in the report for the first time
- When abbreviations are used for the first time, spell the names out

# Evidence and Exhibits

- Documents regarding EO process to this point (formal complaint, prior inquiries, etc)
- Testimony of complainant, responsible official and witnesses
- Pertinent records, documents, memoranda, etc
- Other information (statistics, org chart)

# Discussion and Analysis

- Weigh the evidence
- Introduce your own judgment and observations, supported by appropriate documentation
- Cite your references (tab number and page number)
- Focus on bases and issues
- Identify conflicting testimony and its relative importance
- Clearly identify why you chose to believe one piece of information over another
- Analyze using three step process
  - Prima facie
  - Legitimate, non-discriminatory reason
  - Pretext

# Upon Completion of ROI

- Deliver original and three copies to SEEM
- SEEM and SJA review for legal and administrative sufficiency
- If deficiencies, will be returned to investigator for corrections
- Do not discuss results with any party. Refer all to SEEM

# Analysis - Race, Color, National Origin, Gender

a. Prima facie case

(1) The complainant is a member of a protected class _____.
Yes No

(2) The complainant was qualified to retain or obtain a suitable assignment in .
Yes No

(3) The complainant was not considered for, or was considered for, but was denied an assignment in _____. Yes No

(4) Other personnel with similar qualifications, but who are not members of the complainant's class _____ were assigned to positions in _____ at the time the complainant's placement in such a position was denied.
Yes No

**b. Rebuttal.**

**The _____Army/Air National Guard provided appropriate nondiscriminatory reasons for not providing the complainant a new or continued position in _____ .**

**Yes No**

**c. Pretext. There is direct or circumstantial evidence that the _____National Guard's reason for not providing the complainant a suitable position in _____ is pretextual.**

**Yes No**

**d. Conclusion. Based on the foregoing, the _____ National Guard discriminated against the complainant based on his/her**

# Model for Analysis – Sexual Harassment

- Prima facie case (General):
  - a. The complainant was a victim of a pattern or practice of sexual harassment attributable to a person or persons in the complainant's work environment.
  - b. The complainant applied and was qualified for a benefit (training school, promotion) for which they were eligible and of which they had a reasonable expectation.
- PF - Quid pro quo
  - a. A supervisor made sexual advances.
  - b. Submission to these advances was a term or condition of employment.
  - c. This fact substantially affected complainant's job or was the motivating factor in their reassignment or separation from the military.
  - d. Opposite-gender soldiers were not affected in the same way by the alleged conduct.

# Sexual Harassment: Job Benefits (*Prima facie* case)

**a. The complainant is a member of a protected class (male or female).**

**b. The complainant was subjected to unwelcome sexual harassment.**

**c. The harassment complained of was based upon gender (i.e., but for their gender, they would not have been subjected to the harassment alleged).**

**d. The complainant's reaction to harassment complained of affected tangible aspects of the complainant's terms, conditions or privileges of employment.**

# Sexual Harassment: Hostile Working Environment (Prima facie case)

a. The complainant is a member of a protected class (male or female).

b. The complainant was subjected to unwelcome behavior of a sexual nature; unsolicited conduct regarded as undesirable or offensive.

c. The harassment complained of was based upon gender (i.e. but for their gender, they would not have been subjected to the harassment alleged).

d. The harassment complained of affected a term, condition or privilege of employment; and the harassment was, under the totality of the circumstances, sufficiently pervasive so as to alter the conditions of employment or establish or continue an abusive working environment.

# Sexual Harassment: Opportunities/Benefits

**a. Prima facie case.**

**The complainant must show that:**

**(1) Some opportunity or benefit was granted to some other individual.**

**(2) The complainant did not receive similar opportunities or benefits.**

**(3) The other person received this benefit in return for submission to the named individual's sexual advances or requests for sexual favors.**

**b. Rebuttal.**

**What does the chain of command state as their policy on sexual harassment, its enforcement and the prompt remedial action taken to end the harassment?**

**or**

**(1) The chain of command did not know of the harassment complained of.**

**(2) What does the chain of command state as the reason(s) for withholding opportunities or benefits or for the complainant's separation?**

**or**

**(2) The events did not take place.**

**or**

**(2) Indirectly, by showing that they were**

**c. Pretext.**

**Is there direct or circumstantial evidence that the chain of command's reasons were pretextual?**

**or**

**The chain of command should have known of the harassment and took no corrective action.**

# *QUESTIONS?*